IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 475

GEORGE JONES, JR., *Petitioner,*

v.

JESSE VICTOR HOPPER, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the National Education Association (NEA) and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court,

for leave to file the accompanying brief as *amicus curiae* in this case.

The consent of the attorney for the petitioner herein to the filing of this brief has been obtained and a letter by petitioner's attorney to this effect will be filed with the Clerk of the Court.

The consent of the attorneys for respondents was requested. Although respondents' attorneys did not wish to give their "consent" as such, they indicated that they would not object to NEA participating as *amicus*. A letter to this effect by respondents' attorneys will be filed with the Clerk of this Court.

The interest of the NEA and its reasons for asking leave to file a brief *amicus curiae* are set forth in the accompanying brief.

Respectfully submitted,

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The National Education Association (NEA), upon motion, appears as *amicus curiae* in support of the petition.

QUESTION PRESENTED AND INTEREST OF THE AMICUS CURIAE

1. *The Issue.* The present case raises the issue whether a complaint by a nontenured teacher or professor in a public educational institution, alleging that the teacher's contract was not renewed as a result of

his exercise of First Amendment rights, states a claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, upon which relief can be granted.

This Court's disposition of this issue will have far-reaching consequences to countless teachers and professors throughout the country who have been or are being placed in the same situation as petitioner. The Appendix to this brief sets forth a partial listing and summary of recently decided and pending cases throughout the country involving this same issue.

2. *NEA's Interest.* The NEA has a special interest in the issue presented. The NEA was founded in 1857 and chartered as a non-profit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers. Its charter purpose is to improve the character and advance the interest of the teaching profession and the cause of education in the United States. The NEA has established a fund for the protection of teacher rights, known as the "Du Shane Fund," through which NEA has supported cases across the nation which raise issues similar to that raised in the present case. NEA has accordingly gained special background, experience and competence which it desires to bring to bear on the issue raised in the pending case. NEA further believes that its approach to the issue presented differs from that of petitioner and the other *amicus curiae* (American Association of University Professors).

For the foregoing reasons, NEA deems it appropriate to request leave to appear as *amicus curiae* in support of the petition for writ of certiorari.

STATEMENT OF THE CASE

This suit arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Petitioner, a nontenured associate professor at Southern Colorado State College, alleged in his complaint that, in February 1966, he had received "notice that his services would be terminated at the end of the academic year by a letter sent from the President and authorized by the Board." *Jones* v. *Hopper*, 410 F.2d 1323, 1326 (10th Cir. 1969).[1] Petitioner further alleged that he "was not reappointed . . . because he had exercised his constitutionally protected rights," (*id.*) and more specifically that respondents had "denied him a right of expectancy to continued employment because he exercised freely his constitutional rights of speech, publication and religion" (*id.* at 1327).

On motion by respondents, the District Court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The Court of Appeals for the Tenth Circuit affirmed, *en banc* (two judges dissenting), on the ground that the complaint alleged no "identified interest" protected by the Constitution (*id.* at 1328) since the contract had expired by its own terms and the Professor had no tenure. Judges Seth and Holloway, dissenting, characterized the majority's position in the following manner:

> "The majority bases its opinion on the proposition that there was no 'expectancy' of further em-

[1] Petitioner was informed in the notice that "the Chairman of the Division and the Dean of the College and I agreed upon this decision. The Chairman of the Executive Committee of the College from the Trustees of State Colleges in Colorado was likewise informed at that time." *Id.* at 1326 n. 3.

> ployment, and thus the plaintiff had no 'interest' to be protected by the First Amendment to entitle him to relief . . . . The majority thus holds that under this Colorado statute, and apparently in the absence of a contractual provision or of tenure specifically provided by statute, the board has unlimited power to discharge teachers" (*id.* at 1330).

Petitioner now seeks review from this Court of the decision below.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Abruptly Departs From the Now Settled Rule That the Continued Employment of Teachers at Public Educational Institutions May Not Be Lawfully Conditioned Upon Their Relinquishing Constitutional Rights.

NEA believes that the decision below constitutes an abrupt departure from the settled law in this field and should therefore be summarily reversed concurrently with this Court's grant of the Writ of Certiorari.

Numerous decisions of this Court and of the federal courts of appeals have by now settled beyond dispute that a complaint alleging that a teacher has been denied reemployment at a public educational institution because of his exercise of First Amendment rights states an actionable claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Any dismissal from public employment or failure to renew the contract of a public employee must meet the test of what has been termed "the doctrine of unconstitutional conditions."[2] The doctrine prohibits the

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[2] *See, e.g.*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445 (1968); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1596 (1960).

conditioning of "the enjoyment of a government-connected interest . . . upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution."[3] It was explained by Mr. Justice Sutherland as early as 1926 in *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593-94:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

This principle squarely underlies this Court's line of decisions in cases involving the termination of employment not only of teachers, but of other public employees as well. In *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968), one of the most recent of these decisions, this Court stated:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on

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[3] Van Alstyne, *supra*, 81 Harv. L. Rev. at 1446.

a premise that has been unequivocally rejected in numerous prior decisions of this Court."[4]

The decisions of other federal courts of appeals have also uniformly applied this principle. *E.g., Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947); *Johnson* v. *Branch,* 364 F.2d 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967); *Pred* v. *Board of Pub. Instr.,* 415 F.2d 851 (5th Cir. 1969); *McLaughlin* v. *Tilendis,* 398 F.2d 287 (7th Cir. 1968). The Court of Appeals for the Tenth Circuit is alone in failing to apply the rule of law this Court has so clearly set forth. Such a plain aberration in this important area of constitutional law requires rectification.

II.

This Court Should Review and Reject the Reliance of the Court Below Upon a Putative Distinction Between Mid-Year Dismissal and Year-End Contract Nonrenewal as a Basis for Dismissing Without Hearing a Claimed Violation of Constitutional Rights.

The court below failed to recognize that the interest protected by the Constitution was petitioner's First Amendment rights. Instead, the Tenth Circuit sought

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[4] Among the cases the Court cited were Keyishian v. Board of Regents, 385 U.S. 589 (1967), and Wieman v. Updegraff, 344 U.S. 183 (1952). In *Keyishian,* the Court had emphasized the doctrine of unconstitutional conditions: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." 385 U.S. at 605-06, quoting from the Second Circuit's opinion in *Keyishian* (345 F.2d 236, 239). In *Wieman* (344 U.S. at 191-92), the Court had illustrated the doctrine by quoting from United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947): "Congress could not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."

to create some conceptual distinction between dismissal of a teacher whose contract was yet to expire and the refusal to renew an expired contract. Thus, in the court's view, dismissal of a nontenured teacher during the school term gives rise to a breach of contract of which the teacher may complain, whereas nonrenewal of a contract gives rise to no right because the contract has expired by its own terms. It was on this basis alone that the court below sought to establish a tenuous distinction between the facts in the present case and those in *Bomar* v. *Keyes, supra.*

The lower court's error was in treating the claim asserted by petitioner as one of contract at all. Petitioner alleged in his complaint not that a contract had been breached—whether by premature dismissal or failure to renew—but that his First Amendment constitutional rights to free speech, publication and religion had been violated by reason of respondents' refusal to renew the contract because petitioner had exercised those First Amendment rights. In viewing the issue as one of contract rights rather than constitutional rights, the Tenth Circuit has placed itself in direct contradiction to the other Circuits.

In *Bomar* v. *Keyes, supra,* 162 F.2d at 139, Judge L. Hand clearly recognized that the issue raised was not one of contract, but rather whether a probationary teacher's constitutional right to serve on a jury had been violated. The Fifth and Fourth Circuits have also found contractual and tenure status irrelevant. In *Pred* v. *Board of Pub. Instr.,* 415 F.2d 851, 856 (5th Cir. 1969), involving a nontenured teacher whose contract was not renewed, the court declared:

> "The right sought to be vindicated is not a contractual one, nor could it be since no *right* to re-

> employment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendments rights."

Similar rights were asserted in *Johnson* v. *Branch*, 364 F.2d 177, 179 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967), also involving contract nonrenewal of a nontenured teacher:

> "There is no vested right to public employment. No one questions the fact that the plaintiff had neither a contract nor a constitutional right to have her contract renewed, but these questions are not involved in this case. It is the plaintiff's contention that her contract was not renewed for reasons which were either capricious and arbitrary or in order to retaliate against her for exercising her constitutional right to protest . . . ."

Were the spurious distinction created by the court below between mid-year dismissal and year-end contract nonrenewal substained, a new loophole would be opened by which State agencies might infringe upon, and inhibit the exercise of, First Amendment freedoms of teachers.[5] It would be easy enough for a public school or college administration to defer mid-year dismissal of a teacher whose First Amendment activities are distasteful or troublesome and merely await the end of the academic year, at which time the teacher's contract would not be renewed. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 594 (1926).

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[5]Nonrenewal of contract, just like "dismissal from public employment is . . . a potent means of inhibiting speech." Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).

CONCLUSION

For the foregoing reasons,[6] the Court should grant the writ of certiorari. Since, however, the decision below is an obvious departure from principles established by this Court and followed by other courts of appeals, the Court should summarily reverse the decision below and remand for trial.

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[6] Although not raised by petitioner, another issue inheres in the present case, which in itself not only requires the grant of the writ and reversal, but summary judgment for petitioner as well. The fact is that before respondents determined not to renew petitioner's contract they did not afford him even the semblance of a hearing. Petitioner had a constitutional right to a proper hearing in order to determine whether the grounds for renewal were in fact violative of the First Amendment or otherwise arbitrary and capricious. See *Birnbaum* v. *Trussel*, 371 F.2d 672, 679 (2d Cir. 1966): "A full hearing was the only way plaintiff's substantial interest could have been protected, and Section 1983 affords him a right of action for injuries suffered in consequence of the denial of such a hearing." *See also* Van Alstyne, *supra*, 81 Harv. L. Rev. at 1453.

APPENDIX

Partial listing of recently decided and pending cases involving claims under 42 U.S.C. § 1983 by nontenured teachers that their contracts were not renewed because of their exercise of First Amendment rights.

Montgomery v. *White,* C.A. No. 4933, E.D. Tex.

The complaint, filed by a black teacher in the Tatum Independent School District in Texas, alleged that the plaintiff's contract and the contracts of eight other teachers were not renewed because of their involvement in outside political activities, namely their voter registration activities and their attempt to secure Negro representation on the board of trustees of the school system. On October 24, 1969, the Federal district court directed a verdict for the plaintiff, holding that, by failing to renew the contracts of the plaintiff and others similarly situated, the defendants had deprived them of their First Amendment rights.

Haubner v. *Rushton,* C.A. No. 4835-A, E.D. Va.

Plaintiff, a nontenured professor at Northern Virginia Community College, alleged that he was not reappointed because of his activity in attempting to organize at the college an affiliate of the National Faculty Association—a unit of the NEA. On December 4, 1969, after a day and a half of trial, the defendants agreed to a settlement under which plaintiff was awarded $20,000.

National Faculty Association of Community and Junior Colleges v. *State Board for Community Colleges,* C.A. No. 222-69-R, E.D. Va.

The complaint alleges that the defendants refused to renew the contracts of the plaintiffs—who had taught at Northern Virginia Community College—solely because of their activities as members of a National Faculty Association affiliate, and that the refusal was designed to dis-

courage membership in the plaintiff association and to intimidate teachers from forming professional organizations in Virginia.

Sindermann v. *Perry,* C.A. No. 28,372, C.A. 5.

The complaint, filed by a nontenured social science and government teacher at Odessa Junior College, who was president of the Texas Junior College Teachers Association, alleged that plaintiff's contract to teach had not been renewed because of his absence without permission to attend hearings of a legislative committee of the Texas senate in response to summonses from the committee, because the plaintiff had taken public positions in opposition to the views of the college administration, and because of his association with the "Committee to Elevate Odessa Junior College" to a four-year college status. From an order granting summary judgment for the defendants, the plaintiff has appealed.

Dickerson v. *Board of School Commissioners of Mobile County,* C.A. No. 3003-63-T, S.D. Ala.

The complaint, filed by three nontenured white teachers, who had been employed in all-black schools of the Mobile, Alabama school system, alleges that their contracts were not renewed because of their involvement in peaceful protests against alleged violations by the school system of the civil rights of black students.

Calvin v. *Rupp,* No. N69C15, E.D. Mo.

The complaint, filed by a nontenured journalism teacher who taught in the Brookfield, Missouri school system, alleges that his contract was not renewed, in part because of his activities as a member of the Community Teachers Association, and in part because he criticized censorship of the school newspaper.

Pavlak v. *Duffy*, C.A. No. 13436, D. Conn.

The complaint alleges that the plaintiff was one of six nontenured faculty members at Northwestern Connecticut Community College whose contracts were not renewed because of their support for the prior president of the college, who had been asked to resign by the board of trustees.

Haynes v. *Berna*, C.A. No. 69-1299-C, D. Mass.

The plaintiff, a nontenured white schoolteacher on Nantucket Island, alleges that her contract was not renewed because of "personal standards and prejudices of the defendants, including their disapproval of the plaintiff's association with and intention to marry a person not of her race."

Stevenson v. *Allen*, Case No. 70-33-Civ. T., M.D. Fla.

The complaint, filed by a nontenured professor at the University of South Florida, alleges that his contract is not being renewed because of his outspoken criticism of U. S. participation in the Viet Nam War, his open opposition to the Federal government's plan to create and maintain a system of anti-ballistic missiles, and his personal association with a large segment of the student body in peaceful off-campus protestations and other peaceful activities.

Enbysk v. *Board of Education*, C.A. No. 69C1056, N.D. Ill.

The complaint, filed by two nontenured teachers employed at an Illinois junior college, alleges that their contracts were not renewed because of their exercise of their constitutionally protected rights to speak out on matters concerning the policies of the college and their activities in organizing a professional association of teachers.

Smith v. *Losee,* Civil No. C283-69, D. Utah.

The complaint, filed by an associate professor of history at a junior college in Utah, alleges that the defendants refused to grant the plaintiff tenure and to renew his contract solely because of the exercise of his constitutional rights to express his opinions as a member of the community and of the Dixie College Faculty Association, and in order to discourage efforts by plaintiff and others to participate in political processes and develop a strong and independent faculty association, in violation of plaintiff's First and Fourteenth Amendment rights.